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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/754,347	01/05/2001	Daniel Gelber	XMP 2037	3297

7590

08/13/2002

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EXAMINER

WITZ, JEAN C

ART UNIT

PAPER NUMBER

1651

DATE MAILED: 08/13/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/754,347

Applicant(s)

GELBER ET AL.

Examiner

Jean C. Witz

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 1 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 28 May 2002.
- 2a) ☐ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-106 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☐ Claim(s) _____ is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☒ Claim(s) 1-106 are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- ☐ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____.
- ☐ Interview Summary (PTO-413) Paper No(s). _____.
- ☐ Notice of Informal Patent Application (PTO-152)
- ☐ Other: _____.

DETAILED ACTION

Applicants are advised that the Examiner in this Application has changed.

Applicants are advised to address all future communications to the Examiner listed at the bottom of this office action.

Election/Restriction

Applicants have traversed the restriction requirement and election of species. Particularly, Applicants point to the vague and confusing nature of the restriction requirement and the lack of guidance for making an election. Applicants' arguments have merit and as a result, the restriction requirement and the election of species as set forth in the previous office action have been withdrawn. However, after review of the claims, an election of species is still deemed to be proper and has been set forth below.

This application contains claims directed to the following patentably distinct species of the claimed invention:

Applicants claim generically a composition and method of treatment using said composition where the composition comprises an antihistimine (A) and a nutraceutical (N). However, there are four different subspecies of nutraceuticals claimed: an immune boosting agent (B), an anti-inflammatory agent (I), an anti-oxidant agent (O) and a liver protectant agent (L). Within each subspecies listed above, there are multiple subspecies of each group. The varying numerous combinations present an undue burden of search and examination upon the Examiner to address each combination.

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Therefore the following species are presented. The species are denoted as the letters keyed to the components as set forth above:

- The species of A + B which is covered by claims 11-26, 64-79
- The species of A + O which is covered by claims 27-45, 80-98
- The species of A + I which is covered by claims 50-53, 103-106
- The species of A + L which is covered by claims 46-49, 99-102

Once a species is elected from the list above, Applicants are directed to elect one member from the each group as appropriate:

- Group "B" contains:
 1. zinc and effective salts thereof
 2. herbs of the genus Echinacea
 3. herbs from the genus Sambucus
 4. herbs of the genus Goldenseal
- Group "I" contains:
 1. at least one bioflavenoid or at least one herbal extract containing at least one bioflavonoid
 2. curcumin or at least one abstract containing curcumin
 3. stinging nettle and extracts thereof
 4. bromelain
- Group "O" contains:
 1. at least one bioflavenoid or at least one herbal extract containing at least one bioflavonoid

2. ascorbic acid and pharmaceutically effective salts thereof
3. garlic and extracts thereof
4. green tea and extracts thereof
5. at least one herb selected from the genus Astragalus

Therefore, for example, if species A + B is elected, Applicants are directed to elect a single subspecies listed from Group "B" as well as one from Group "I" and Group "O" (as a result of dependent claims that include a third ingredient in combination with A + B). Also please note that no election is required for components D or L.

Applicant is required under 35 U.S.C. 121 to elect a single disclosed species for prosecution on the merits to which the claims shall be restricted if no generic claim is finally held to be allowable. Currently, claims 1-10, 54-56 and 59-63 are generic to the entire invention, claims 4-5 and 57-58 are generic to species A + B and A + O, claims 14 and 67 are generic to species A + B and claims 30 and 83 are generic to species A + O.

Applicant is advised that a reply to this requirement must include an identification of the species that is elected consonant with this requirement, and a listing of all claims readable thereon, including any claims subsequently added. An argument that a claim is allowable or that all claims are generic is considered nonresponsive unless accompanied by an election.

Upon the allowance of a generic claim, applicant will be entitled to consideration of claims to additional species which are written in dependent form or otherwise include all the limitations of an allowed generic claim as provided by 37 CFR 1.141. If claims

are added after the election, applicant must indicate which are readable upon the elected species. MPEP § 809.02(a).

Should applicant traverse on the ground that the species are not patentably distinct, applicant should submit evidence or identify such evidence now of record showing the species to be obvious variants or clearly admit on the record that this is the case. In either instance, if the examiner finds one of the inventions unpatentable over the prior art, the evidence or admission may be used in a rejection under 35 U.S.C. 103(a) of the other invention.

Applicants are advised that, per MPEP 811.02, since 37 CFR 1.142(a) provides that restriction is proper at any stage of prosecution up to final action, a second requirement may be made when it becomes proper, even though there was a prior requirement with which applicant complied. *Ex parte Benke*, 1904 C.D. 63, 108 O.G. 1588 (Comm'r Pat. 1904). Also, per MPEP 811.03, where a requirement to restrict is made and withdrawn, because it was improper, when it becomes proper at a later stage in the prosecution, restriction may again be required.

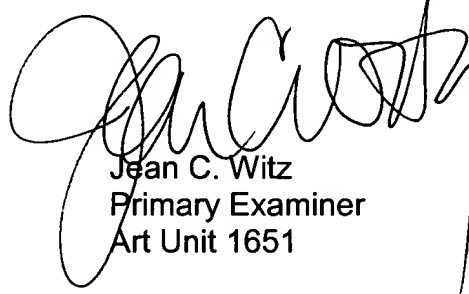
Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jean C. Witz whose telephone number is (703) 308-3073. The examiner can normally be reached on 6:30 a.m. to 4:00 p.m. M-Th and alternate Fridays.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Wityshyn can be reached on (703) 308-4743. The fax phone numbers for the organization where this application or proceeding is assigned are (703)

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872-9306 for regular communications and (703) 872-9307 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0196.



Jean C. Witz
Primary Examiner
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August 11, 2002